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No. 85-1981

In The

Supreme Court of the United States

October Term, 1985

GREGORY MARKETING CORPORATION and DANIEL SCHER,

Petitioners,

vs.

WAKEFERN FOOD CORPORATION and RED CHEEK, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a victim of a retaliatory discharge for refusal to partake in an antitrust scheme has standing pursuant to Section 4 of the Clayton Act to assert antitrust claims?

2. Whether a party must be a consumer or a competitor to have standing pursuant to Section 4 of the Clayton Act to assert antitrust claims?

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GREGORY MARKETING CORPORATION and DANIEL SCHER,

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vs.

WAKEFERN FOOD CORPORATION and RED CHEEK, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Gregory Marketing Corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 26, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported and appears in Appendix A of this petition.

The unreported opinion of the United States District Court for the District of New Jersey appears in Appendix B of this petition.

STATEMENT OF JURISDICTION

A judgment order affirming the judgment of the District Court was entered by the United States Court of Appeals for the Third Circuit on March 26, 1986.

Jurisdiction to review this judgment by writ of certiorari exists pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved herein are 15 U.S.C. § 15(a) and 15 U.S.C. § 13(a), set forth at length in Appendix C and D of this petition.

STATEMENT OF THE CASE

This case raises the issue of whether a victim of an antitrust scheme has standing pursuant to Section 4 of the Clayton Act to assert antitrust violations, notwithstanding the fact that the party is neither a consumer nor a competitor in the market which is directly affected by the antitrust violation.

For thirty years, Gregory Marketing ("Gregory") acted as a food broker for Red Cheek, Inc. ("Red Cheek"), a manufacturer and distributor of apple juice. As the broker, Gregory sold Red Cheek's products to supermarket chains and large buying

cooperatives, including Wakefern Food Corporation ("Wakefern").

In or about February, 1984, Red Cheek agreed to sell its forty-ounce container of apple juice to Wakefern at a special price discount, not available to the rest of the marketplace. Upon learning of the preferential pricing, the president of Gregory objected to the unlawful discounts, and refused to partake in the anticompetitive arrangement. Rather than discontinuing the unlawful arrangement, Red Cheek directed Gregory to provide fabricated explanations to inquiring competitors. When Gregory refused to follow Red Cheek's directions, the brokerage agreement was abruptly terminated.

Gregory then commenced this action pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a) for damages arising out of the retaliatory termination, alleging, *inter alia*, violations of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).

On February 25, 1986 the District Court granted respondents' motion to dismiss, holding that Gregory lacked standing to challenge the anticompetitive pricing scheme of respondents.

On appeal, the Third Circuit, with Judge Gibbons dissenting, affirmed, specifically declining to follow the rule of the Ninth Circuit in *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982) ("*Ostrofe I*"), *vacated and remanded,* 460 U.S. 1007 (1983), *on remand,* 740 F.2d 739 (9th Cir. 1984) ("*Ostrofe II*"), *cert. dismissed,* 105 S. Ct. 1155 (1985), which permitted an antitrust suit in the context of retaliatory termination for refusal to partake in a price fixing arrangement. The Third Circuit also failed to adopt the rationale of *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982), the most recent holding of a District Court in the Third Circuit which adopted the *Ostrofe I* rule and granted antitrust standing in the retaliatory discharge context.

REASONS FOR GRANTING THE WRIT

I.

THIS WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUIT COURTS ON THIS IMPORTANT ISSUE OF FEDERAL COURT JURISDICTION.

Of the three Circuit Courts of Appeals which have dealt with antitrust standing under Section 4 of the Clayton Act in the context of a retaliatory discharge, the Third Circuit in this case and the Seventh Circuit in *In re Industrial Gas Litigation*, 681 F. 2d 514 (7th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983) have denied standing. The Ninth Circuit has granted standing. *Ostrofe v. H.S. Crocker, Inc.*, 670 F. 2d 1378 (9th Cir. 1982), *vacated and remanded,* 460 U.S. 1007 (1983), *on remand,* 740 F. 2d 739 (9th Cir. 1984), *cert. dismissed,* 105 S. Ct. 1155 (1985).

Section 4 of the Clayton Act provides broad coverage of the antitrust laws by permitting suits by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). The statute's comprehensive and unrestricted language reflects its controlling purpose: improved enforcement of the antitrust laws, effective deterrence of the future violation and relief to those injured by anticompetitive conduct. *See Reiter v. Sanstone Corp.*, 442 U.S. 330 (1979); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) ("*Blue Shield*"). Although certain limitations on standing have been imposed by this Court to prevent duplicative recoveries, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), no such considerations are present in the context of a retaliatory discharge. In such a setting, the discharged victim is the only party who may claim damages based upon lost income or profits.

Nor does the multifactoral standing analysis recently

enunciated in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) afford any reason for denying standing. The injury sustained by the discharge victim is direct and is certainly intertwined with the antitrust scheme and violation.

This case presents an excellent opportunity for the Court to resolve the split in the Circuits and to decide an important issue of federal jurisdiction.

II.

THE THIRD CIRCUIT'S RULING CONFLICTS WITH THE HOLDING IN *BLUE SHIELD OF VIRGINIA V. McCREADY.*

In *Blue Shield of Virginia v. McCready, supra,* this Court expressly rejected the requirement that the plaintiff be a consumer or competitor to have standing under Section 4 of the Clayton Act. In that case, this Court granted standing, observing that:

> [T]he statute [Clayton Act] *does not confine its protection to consumers or to purchasers, or to competitors* . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practice by whomever they may be perpetrated [citing *Mandeville Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)]. (Emphasis supplied.) (*Blue Shield, supra* at 472).

Moreover, in *Blue Shield*, this Court rejected a reading of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), which would require all petitioners to show that their injuries reflect the "anticompetitive effect" of the violation:

> . . . [p]etitioners reason that McCready can maintain no action under Section 4 because her injury "did not reflect the anticompetitive effect" of the alleged violation.
>
> *Brunswick is not so limited. Indeed, as we made clear in a footnote to the relied-upon passage, a Section 4 plaintiff need not "prove an actual lessening of competition in order to recover.* [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Id.* at 489, n. 14, 50 L. Ed. 2d 701, 97 S. Ct. 690. (emphasis supplied.)

The rationale of *Blue Shield* was applied in *Ostrofe II*, where the Ninth Circuit reconfirmed that the injuries need not directly arise from the anticompetitive effect of the violation:

> The rationale of *Blue Shield* favors Ostrofe's right to sue. The Court's refusal to limit recovery to those whose injuries resulted from the anticompetitive effect of the violation undercuts conceptual objections to allowing suit by an employee discharged for refusing to effectuate an antitrust violation. The Court's extension of the right to sue to persons whose injury is a 'necessary step' and the 'means' employed by their conspirators to achieve their anticompetitive end provides a principle basis for recognizing Ostrofe's right to sue. 740 F.2d at 745.

Yet, the majority below rejected the teachings of *Blue Shield* and *Ostrofe II*, and noted that "Gregory is neither a consumer nor a competitor in the apple juice market, and thus is not within

that area of the economy . . . endangered by [the] breakdown of competitive conditions . . ."

Since a prior decision of this Court made patently clear that Section 4 of the Clayton Act does not require petitioners to be consumers or competitors to have standing to assert antitrust claims, this writ should be granted to restate and reconfirm this proposition which has apparently alluded the Third Circuit in this action.

III.

THE WRIT SHOULD BE GRANTED TO RESOLVE ISSUES LEFT OPEN IN *ASSOCIATED GENERAL CONTRACTORS.*

Although this Court established a multifactoral analysis in assessing antitrust standing in *Associated General Contractors*, one critical issue was not decided in that case; namely, whether a person who does not suffer antitrust injury in the technical sense, but is a victim of conduct undertaken to accomplish the anticompetitive end has standing to assert antitrust claims. *See Associated General Contractors, supra*, n. 44 at 541. Hence, the notion of "antitrust injury" as well as the directness of injury test enunciated in *Associated General Contractors*, should be further delineated by the Court at this juncture.

At least one Circuit Court of Appeals has granted standing where the victim did not suffer antitrust injury in the strict sense. The Ninth Circuit in *Ostrofe II* granted standing where the injuries did not directly stem from the antitrust activity reasoning that affording standing "encourages exposure" of antitrust schemes by persons "best situated to know of their existence". *Ostrofe II, supra* at 747.

Here, as in *Ostrofe II*, Gregory is the only other party besides the respondents who has knowledge of the anticompetitive plan, and is the only party who can expose the covert scheme. Denying standing on the grounds that the victim of the retaliatory discharge is not directly affected by the anticompetitive conduct will likely leave a significant antitrust violation undetected and unremedied.

If Section 4 of the Clayton Act is to provide private antitrust enforcement, the concept of antitrust injury must be defined to encompass all those individuals who are affected by the prohibited conduct.

CONCLUSION

This petition presents an opportunity for the Court to further delineate important issues of federal jurisdiction and resolve a split among the Circuit Courts of Appeals. For these reasons, and those discussed herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-5206

GREGORY MARKETING CORPORATION and DANIEL SCHER,

Appellants

v.

WAKEFERN FOOD CORPORATION and RED CHEEK, INC.,

Appellees

On Appeal from the United States District Court for the District of New Jersey (Newark)
C.A. No. 84-4554-A

Argued December 5, 1985

Before: ADAMS, *Acting Chief Judge,*
GIBBONS and STAPLETON,
Circuit Judges.

(Filed March 26, 1986)

Appendix A

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OPINION OF THE COURT

ADAMS, *Acting Chief Judge.*

Appendix A

Under the Robinson-Patman Act, a seller ordinarily may not charge different buyers unequal prices for the same product. The issue in this appeal is whether a law suit challenging alleged price discrimination may be maintained under § 4 of the Clayton Act by a broker whose services were terminated for refusing to carry out a manufacturer's allegedly unlawful discount for a preferred buyer. The district court dismissed the claim, ruling that the broker was not a proper party to bring suit under the antitrust laws. We agree, and therefore will affirm.

I.

Since 1954, appellant Gregory Marketing Corporation (Gregory) has served as broker in New Jersey for Red Cheek, Inc. (Red Cheek), a manufacturer of apple juice. As broker, Gregory sold Red Cheek's products to commercial distributors and retailers, including Wakefern Food Corporation (Wakefern), a large buying cooperative engaged in bulk purchasing and redistribution on behalf of numerous supermarket chains. Under an agreement with the manufacturer, Gregory was compensated by receiving a percentage of its gross sales of Red Cheek products.

In 1984, Red Cheek began providing Wakefern with special price discounts not available to other purchasers. For example, according to Gregory's complaint, which is assumed to be true for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), while all other customers paid $11.85 for each case of 40-ounce containers of apple juice, Wakefern began receiving one case free for each case purchased.

When he learned of these practices in February 1984, Daniel Scher, Gregory's majority shareholder and a corporate officer, objected, and informed Red Cheek that the discounts to Wakefern

were unlawful.[1] Red Cheek, however, declined to stop the discounts. Instead, according to the complaint, it directed Gregory to fabricate explanations justifying the discounts for any of Wakefern's competitors who inquired. When Gregory refused to comply, Red Creek terminated its brokerage agreement.

On October 31, 1984, Gregory filed suit against Red Cheek and Wakefern, alleging that they violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982).[2] The Act prohibits sellers from discriminating in price between different purchasers of a product in order to give one a competitive advantage. The complaint was brought under Section 4 of the Clayton Act, which affords treble damages to plaintiffs injured by "anything forbidden in the antitrust laws."[3] 15 U.S.C. § 15(a)

---

1. Scher was also a plaintiff in the lawsuit, and joined Gregory in filing this appeal. However, it was conceded below that Scher lacked standing as an individual to bring suit, and that his claim was entirely derivative of Gregory's.

2. The Act states, in pertinent part, that

> [i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them . . . 15 U.S.C. § 13(a).

3. Section 1 of the Clayton Act defines "antitrust laws" as the Sherman Act, the Wilson Tariff Act, and the Clayton Act. This includes § 2 of the Robinson-Patman Act, which is an amendment to the Clayton Act. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 378-379 (1959). 2 P. Areeda & D. Turner, *Antitrust Law* ¶331 n.1 (1978).

(West Supp. 1985). Gregory alleged that it had suffered two distinct injuries as a consequence of the defendants' pricing practices: Red Cheek's retaliatory termination of the brokerage agreement resulted in the loss of future brokerage commissions plaintiff otherwise would have received, and the discounted prices on sales to Wakefern reduced the broker's commission on the gross sales it actually made to the buying cooperative before being terminated. In addition to the federal claim, Gregory also asserted pendent state claims, including breach of a brokerage agreement, violation of state antitrust statutes, and tortious interference with plaintiff's contract rights and prospective business advantage.

The district court granted the defendant's motion to dismiss on February 25, 1985. Drawing on a series of Supreme Court cases designed to limit the broad scope of the Clayton Act's treble damage provision, the court ruled that Gregory could not maintain a suit challenging the anticompetitive Red Cheek-Wakefern pricing scheme because the broker's injury did not result from the anticompetitive nature of the arrangements. Gregory's injury did not flow "from that which makes defendants' acts unlawful," *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 482 (1982), *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977), and thus it "is not the type of injury that the antitrust laws were written to guard against," the district court declared. As further grounds for ruling that Gregory could not maintain the suit, the court noted that Wakefern's competitors, who were directly injured by the pricing scheme, could still sue for treble damages. Allowing the broker to sue, therefore, would subject the defendants to "overkill" by exposing them to the risk of multiple treble damage liability.

In dismissing Gregory's claim, the court specifically declined to apply the rule of *Ostrofe v. H.S. Crocker Co., Inc.,* 670 F.2d

1378 (9th Cir. 1982), *vacated and remanded,* 460 U.S. 1007 (1983), *on remand,* 740 F.2d 739 (9th Cir. 1984), *cert. dismissed,* 105 S. Ct. 1155 (1985), which allowed an antitrust suit by an employee forced to resign from his job for declining to carry out a price fixing arrangement. The district court suggested that an employee's injury is more closely linked to the antitrust violation than a broker's would be, and further stated that neither the Supreme Court nor the Third Circuit has yet extended standing under the antitrust laws as far as the *Ostrofe* court. *See McNulty v. Borden, Inc.,* 542 F. Supp. 655 (E.D. Pa. 1982). Gregory filed a timely appeal.

II.

On its face, Section 4 of the Clayton Act defines an extremely broad class of persons who may bring a private action for treble damages under the antitrust laws. The language allows a suit by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. Thus, "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519 (1983). While acknowledging that the lack of restrictive terms in this provision "reflects Congress's 'expansive remedial purpose.' " *Blue Shield of Virginia, Inc. v. McCready,* 457 U.S. 465, 472 (1982) [quoting *Pfizer, Inc. v. Government of India,* 434 U.S. 308, 314 (1978)], the Supreme Court has declined to read the statute as broadly as its language would allow. Instead, it has imposed limitations consistent with the statutory policies behind the awarding of treble damages; deterring antitrust violators and depriving them of the fruits of their illegal actions, and providing ample compensation to the

victims. *Pfizer,* 434 U.S. at 314; *Merican, Inc. v. Caterpillar Tractor Co.,* 713 F.2d 958, 963 (3d Cir. 1983), *cert. denied,* 104 S. Ct. 1278 (1984).

The restrictions fall into two categories. First, the Supreme Court has refused to permit antitrust suits that raise the risk of multiple treble damage recoveries or complex damage theories that would make antitrust suits unduly difficult to try. Thus, in *Hawaii v. Standard Oil,* 405 U.S. 251, 264 (1972), it held that § 4 did not authorize a state to sue in its *parens patriae* capacity for damages to its "general economy" because even a lengthy trial could not cope with the problems of double recovery. And in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), the Court ruled that an indirect purchaser in a chain of distribution may not maintain a damage action against a seller for overcharges in violation of the Sherman Act passed on by the direct purchase. Allowing every person along a chain of distribution to claim damages for a single transaction would risk duplicative recoveries; apportioning the damages would require massive evidence and overly complex damage theories, "discourag[ing] vigorous enforcement of the antitrust laws by private suits," *Blue Shield,* 457 U.S. at 474-475 n.11. Accordingly, the Court reasoned, to allow such suits would be "inconsistent with the broader remedial purposes of the antitrust laws." *Merican,* 713 F.2d at 964.

A second type of limitation, more central in the Supreme Court's recent opinions, concerns the proximity of the antitrust injury alleged and the harm suffered by the plaintiff. In an inquiry analogous to the proximate cause question in tort liability, courts must determine whether the injuries claimed by a plaintiff are "too remote from the alleged violation" to justify allowing treble damages recovery. *Blue Shield,* 457 U.S. at 477. As with proximate

cause, this question cannot be answered by application of a bright-line rule:

> In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will govern in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

Associated General Contractors, 459 U.S. at 536-537; *see Bravman v. Bassett Furniture Industries,* 552 F.2d 90, 99 (3d Cir.), *cert. denied,* 434 U.S. 823 (1977).

In *Associated General Contractors,* the Supreme Court identified the critical factors to be examined in this type of inquiry, including "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535.[4] In addition, the Court weighed in the balance the interest in avoiding the risk of duplicative recoveries or unmanageable damage theories as in *Illinois Brick.*

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4. This inquiry has sometimes been referred to as a question of antitrust standing, but the doctrine of standing in the antitrust context differs from standing in the constitutional sense. *Associated General Contractors,* 459 U.S. at 535 n.31. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Id.; see* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale L.J. 809, 813 n.11 (1977).

Appendix A

III.

Application of the factors[5] in *Associated General Contractors* and *Illinois Brick* suggests that Gregory is not an appropriate party to assert the claim set forth in the present lawsuit. Although allegedly Gregory has been injured by Red Cheek's conduct and Red Cheek has engaged in anticompetitive practices, Gregory's injury did not result from the anticompetitive nature of these practices.

Gregory does point to certain factors that support allowing it to maintain a suit. As in *Associated General Contractors,* the complaint asserts a causal connection between the alleged antitrust violation and the harm to the broker; it also avers an intent to harm. But neither causation in this but-for sense nor an allegation of improper motive is sufficient to "enable any complaint to withstand a motion to dismiss." *Id.* at 537.

It is also crucial to focus on the nature of Gregory's injury, since "in each case [the] alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." *Associated General Contractors,* 459 U.S. at 540. In that case, trade unions sued an association of contractors, claiming that the association improperly narrowed the market for construction contracting and subcontracting.

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5. None of the Supreme Court's antitrust standing cases involved alleged violations of the Robinson-Patman Act. However, those cases interpret § 4 of the Clayton Act, the same provision governing Gregory's standing to bring suit in this case, and we thus apply the general principles developed in the Sherman Act cases in light of the particular law creating the substantive antitrust violation. *See, e.g.* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-211 (3d Cir. 1980).

The unions, however, were neither competitors nor consumers in that market, and their injury did not result from the alleged restraint of the market. The Supreme Court consequently determined that the union had suffered no antitrust injury.

The antitrust violation alleged by Gregory grows out of the pricing agreement between Wakefern and Red Cheek. This agreement, it is argued, may lead to reduced competition in the apple juice market, a result the Robinson-Patman Act was intended to prevent. But Gregory is neither a consumer nor a competitor in the apple juice market, and thus is not "within that area of the economy . . . endangered by [the] breakdown of competitive conditions . . .' " *Blue Shield,* 457 U.S. at 481 [quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 129 (9th Cir. 1973)].[6]

Gregory seeks damages for two distinct injuries, diminution of future income resulting from its loss of the Red Cheek contract, and reduced commissions received on discounted sales to Wakefern. The lost future income clearly does not flow from decreased competition in the apple juice market. That injury was inflicted by Red Cheek's termination of Gregory's contract.

Similarly, the reduced profit on commissions, although it

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6. Section 2 of the Robinson-Patman Act, an amendment to the Clayton Act, was enacted in 1936 in response to growing evidence that large chain buyers were using their greater purchasing power to obtain preferences over smaller independent stores. Federal Trade Comm. v. Henry Broch & Co., 363 U.S. 166, 174 (1960). Commentators have concluded that concern with the impact of these discounts on the independent retailers, so-called secondary-line discrimination, "was in fact the principal impetus to enactment of the 1936 amendments." R. Posner & F. Easterbrook, Antitrust 943-944 (2d ed. 1981).

resulted from the Red Cheek-Wakefern agreement, was not caused by the anticompetitive nature of that agreement. If Red Cheek had reduced its prices for all buyers, for example, Gregory would still have lost commissions, but there would have been no antitrust violation. Conversely, if Red Cheek had provided Wakefern with special discounts, but simply absorbed the loss itself and neither told Gregory nor demanded that the broker fabricate an explanation for other customers, the agreement would be equally anticompetitive, but Gregory would have suffered no injury. *See Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978); *Haff v. Jewelmont Corp.*, 594 F. Supp. 1468, 1477 (N.D. Cal. 1984).

Gregory argues that *Blue Shield* substantially weakens the importance of the burden on plaintiffs to show that their injuries reflect the "anticompetitive effect" of the violation. *Blue Shield*, however, cannot be read as broadly as the appellant endeavors to do. There, the plaintiff charged that Blue Shield purposefully pursued an anticompetitive scheme, by inducing its subscribers to select psychiatrists rather than psychologists for psychotherapy services. Denying reimbursement to individuals such as the plaintiff, who was treated by a psychologist, "was a necessary step in effecting the ends of the alleged illegal conspiracy," *id.* at 479, and "the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* at 484.

Here, by contrast, Gregory's participation was not essential to carrying out the alleged anticompetitive agreement between Red Cheek and Wakefern. Red Cheek could have effected the discounts without even notifying Gregory. And while the plaintiff in *Blue Shield* was a consumer of psychotherapy services, Gregory was simply a broker, whose own profits would not necessarily be

reduced by diminished competition. ***Blue Shield,*** therefore, does not excuse Gregory's failure to demonstrate an antitrust injury.

Nor are we persuaded by the rationale of *Ostrofe v. H.S. Crocker Co., Inc.,* 670 F.2d 1378 (9th Cir. 1982) (*Ostrofe I*), *vacated and remanded in light of Associated General Contractors,* 460 U.S. 1007 (1983), *on remand,* 740 F.2d 739 (9th Cir. 1984) (*Ostrofe II*), *cert. dismissed,* 105 S. Ct. 1155 (1985), that Gregory has suffered an antitrust injury. In that case, the Ninth Circuit permitted a suit alleging a Sherman Act violation to be brought by a former marketing director of a company who was discharged for refusing to carry out a bid-rigging scheme. That view has generally been rejected in similar cases by other courts. *See, e.g., In re Industrial Gas Litigation,* 681 F.2d 514, 519 (7th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983); *McNulty v. Borden,* 542 F. Supp. 655 (E.D. Pa. 1982); *Callahan v. Scott Paper Co.,* 541 F. Supp. 550 (E.D. Pa. 1982). *Contra Shaw v. Russell Trucking Line, Inc.,* 542 F. Supp. 776 (W.D. Pa. 1982). Even were we to adopt the Ninth Circuit rule as to employees, it would not affect the outcome here. Analogizing to ***Blue Shield,*** *Ostrofe II* relied heavily on the fact that the marketing director was an "essential participant" in the price-fixing scheme, which "could not succeed without his active cooperation." *Ostrofe II,* 740 F.2d at 745-746. As noted above, however, this rationale is not applicable here since Gregory was not essential to the Red Cheek-Wakefern arrangement. Thus, *Ostrofe II* does not support Gregory's argument that it has sustained an antitrust injury.

That the Robinson-Patman Act encompasses potential impact on competition, as the dissent notes, does not assist Gregory in seeking to demonstrate antitrust injury. The problem with Gregory's complaint, under the foregoing analysis, is not that it asserts injuries resulting from potential rather than actual

anticompetitive effects, but rather that the injuries it alleges do not result from anticompetitive market impact of either kind. In implicit acknowledgement of this failing, the dissent now sets forth a theory not previously advanced in this litigation: that the Red Cheek-Wakefern agreement might lead to decreased competition in the *brokerage* market in which Gregory competes, which, in turn, could damage Gregory. Even if such "intermediary" market effect came within the scope of the antitrust laws, there is no basis in the pleadings in this case for finding that there might be such an impact on Gregory. Neither in its complaint nor in its oral argument and memoranda in the district court and in this court did Gregory ever suggest that the price discrimination under challenge would, as the dissent hypothesizes, "lessen competition in the intermediary market in which it competes." Ante at ____. Ordinarily, an appellate court is reluctant to consider arguments not raised in a party's brief or at oral argument. *See Publishers Resource v. Walker-Davis Publications,* 762 F.2d 557, 560 (7th Cir. 1985). In any event, the dissent's theory of antitrust injury is not only speculative; in fact, Gregory disavowed it before the district court, stating that it is "neither a consumer nor a competitor in *any market* of the economy relevant to this action . . ." App. at 22 (emphasis added).

Along with causation and the nature of the plaintiff's injury, a third factor considered under *Associated General Contractors* is the directness or indirectness of the injury alleged. In this case, Wakefern's competitors felt the effects of the injury most directly, while Gregory occupied only an incidental role in the alleged anticompetitive scheme. Wakefern's competitors, then, would be the most likely parties to sue. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public in enforcement diminishes the justification

for allowing a more remote party to serve as private attorney general." *Id.* at 542.

Consideration of the policies of *Illinois Brick* and *Standard Oil* against allowing lawsuits that raise the risk of duplicative damage awards or excessive complexity, while not a primary concern here, provides additional reason for not permitting Gregory's suit. Gregory's own argument illustrates the problem: it contends that while it would recover for lost commissions and future profits, Wakefern's competitors could seek damages for sales lost as a result of the antitrust violation, and consumers could assert claims based on higher prices paid for products. Recognition of all of these claims, however, would require joinder of the potential plaintiffs to deal with problems of multiple litigation and liability, greatly complicating the trial. *See Illinois Brick,* 431 U.S. at 740. It is true that this case does not present the precise problem of calculating "pass-on" damages along a chain of distribution as in *Illinois Brick.* However, we believe the Supreme Court's concern not to add "whole new dimensions of complexity to treble-damage suits" that would "seriously undermine their effectiveness," *id.* at 737, is applicable here as well, and bolsters the other factors weighing against allowing Gregory's lawsuit.

Finally, we come to Gregory's contention that, even if it has not met the criteria established in *Associated General Contractors,* its suit should be permitted in order to promote vigorous enforcement of antitrust violations. This theory draws on an alternative holding in *Ostrofe II,* which stated that allowing a suit by an employee discharged for refusing to cooperate in an antitrust violation "encourages exposure of such schemes by persons best situated to know of their existence." *Id.* at 747. Even if the plaintiff has not sustained an antitrust injury in the "technical

sense," Gregory argues, the suit should be permitted because "it is unlikely that any other victim with knowledge of the conspiracy sustained a kind of injury that would give him equal incentive to bring the antitrust violators to account." *Ostrofe II* at 747.

While we agree that effective antitrust enforcement is a salutary goal, we cannot accept Gregory's argument. The treble damages remedy of § 4 is an extraordinary one, and must be carefully confined within reasonable limits. Indeed, the judicial doctrine limiting the class of possible § 4 plaintiffs " 'acknowledges that while many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of [someone] who is an immediate victim of the violation,' and that 'if the flood-gates were opened to permit treble damage suits . . . the lure of a treble recovery . . . would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress.' " *Mid-West Paper Products Co. v. Continental Group,* 596 F.2d 573, 587 (3d Cir. 1979), (quoting *Calderone Enterprises, Inc. v. United Artists Theatre Circuit,* 454 F.2d 1292, 1295-96 (2d Cir. 1971)), *cert. denied,* 406 U.S. 930 (1972). Allowing Gregory to maintain this suit, we believe, could lead to just type of excess.

IV.

We do not take lightly claims that a manufacturer has engaged in the kind of conduct alleged here by Gregory, nor are we unsympathetic to the plight of a broker whose contract allegedly has been terminated for refusing to assist in price discrimination it believes to be unlawful. However, New Jersey law provides a remedy for breach of contract, and we believe that such an action, rather than a lawsuit under the Clayton Act, is the

appellant's appropriate recourse. The judgment of the district court will be affirmed.

GIBBONS, *Circuit Judge,* dissenting:

Gregory Marketing Corp. is engaged in interstate commerce as an independent food broker, acting as a sales intermediary between primary line food packagers and food retailers. Its business is separate from and independent of both the food packagers it represents and the food retailers to which it sells. Gregory alleges that a food retailer, Wakefern Food Corp. to whom it sold products packaged by a primary line food packager, Red Cheek, Inc., went behind Gregory's back and exacted from that packager a discriminatory price discount in violation of section 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982). There is no question that the facts alleged amount to a violation of that Act, and the majority does not suggest otherwise.

Gregory's complaint seeks money damages, and "such further relief as this Court may deem just and equitable." Joint Appendix 6-7. Fairly read, however, it does not seek injunctive relief pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26 (1982). It pleads reliance only on section 4 of the Clayton Act, 15 U.S.C. § 15 (1982). Thus the majority's affirmance of the district court's dismissal of Gregory's complaint for lack of standing does not reach the question whether an intermediary in a chain of distribution would have standing to seek injunctive relief against violations of the Robinson-Patman Act. If that question were to arise, I assume that it would be controlled by *Mid-West Paper Products Co. v. Continental Group, Inc.,* 596 F.2d 573, 589-94 (3d Cir. 1979). I read the majority opinion, therefore, only as an interpretation of section 4 of the Clayton Act, which authorizes recovery of money damages.

Of course, those cases that interpret section 4 to be limited by judge-made standing rules of necessity also interpret to some extent the substantive antitrust laws that establish the appropriate standard of conduct in the marketplace and give rise to the underlying violation. Thus section 4 standing has been held to vary depending on whether the antitrust law that has been violated is one aimed at potential or actual injury to competition. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Like section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), which was the section dealt with in *Brunswick,* section 1 of the Robinson-Patman Act is a prophylactic statute. A violation can be proved by the mere showing that the effect of the targeted conduct may be to substantially lessen competition. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981).

Because the interpretation of section 4 varies depending upon the substantive law underlying the plaintiff's claim, it seems appropriate to consider what areas of competition are intended to be protected by the substantive law relied upon in this case. The Robinson-Patman Act was adopted by Congress in 1936 specifically as an effort to curb the market power possessed by chain retailers such as Wakefern Foods Corporation.[1] The Robinson-Patman Act, however, was only enacted as an amendment to section 2 of the Clayton Act. *See* ch. 323, § 2,

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1. *See* Federal Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 43 (1948); H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. (1936); Federal Trade Commission, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act,* 8-11 (2d rev. ed. 1959); J. Palamountain, *The Politics of Distribution,* 188-234 (1955); Rows, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective,* 57 Colum. L. Rev. 1059 (1957); Report of the Attorney General's National Committee to Study the Antitrust Laws, 155-156 (1955).

38 Stat. 730, 730-31 (1914), as amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526-28 (1936) (current version at 15 U.S.C. § 13(a)-(f) (1982)). Section 2 of the Clayton Act had the much broader purpose of prohibiting those predatory pricing practices that were injurious to competition at any level.[2] Thus section 2 forbade price discrimination "where the effect . . . may be to substantially lessen competition or tend to create a monopoly *in any line of commerce,*" 38 Stat. at 730. The Robinson-Patman Act carried forward from the 1914 statute the italicized language "*in any line of commerce.*" *See* 15 U.S.C. § 13(a). Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination "where the effect . . . may be substantially to lesen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination or with customers of either of them . . ." *Id.*

Consistent with its plain language, courts have construed the statute to be aimed at protecting competition at all levels: primary, secondary, and tertiary. Long before the 1936 amendment the Supreme Court had observed, "The phrase is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253 (1929) (rejecting construction that section 2 only protected primary line competition between the discriminator and its competitors). Since the 1936 amendment the Supreme Court has reconfirmed this broad interpretation of the statute. *See, e.g., Federal Trade Commission v. Anheuser Busch, Inc.*, 363 U.S. 536, 543-45 (1959) (competitors of the discriminating seller are protected).

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2. H. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914).

Appendix A

Gregory is engaged in commerce as a food broker. As such it competes with others in the economy who actually and can potentially perform the same intermediary function that it performs. The discrimination of which Gregory complains has an effect upon retail level competitors of Wakefern Foods, Inc. It has an effect on food processor level competitors of Red Cheek, Inc. It also has an effect upon Gregory. The complaint alleges that while the discrimination was going on unknown to Gregory, Gregory was deprived of commission revenue, and that if Gregory would have continued to countenance it there would have been further revenue loses.

Whether that deprivation of revenue at the intermediate level of distribution is one that is likely to lessen competition or to tend to create a monopoly in Gregory's line of commerce is not a matter that can be decided on the pleadings. Certainly under the complaint Gregory could attempt to prove that the price discrimination of which it complains would have the tendency to substantially lessen competition in the intermediary market in which it competes. For example, Gregory could attempt to prove that in order to sustain the price discrimination over time the manufacturer would be likely to take over the distribution function that Gregory performed, thereby eliminating it as a competitor in the intermediate market.

The majority, although focusing upon section 4 rather than section 2(a), seems implicitly to hold that Gregory is not within the zone of protection of the latter section. The opinion notes that "Gregory is neither a consumer nor a competitor in the apple juice market, and thus is not 'within that area of the economy . . . endangered by [that] breakdown of competitive conditions'." Typescript at 10 (quoting *Blue Shield of Virginia, Inc. v. McCready,* 457 U.S. 465, 480-481 (1982)). The majority is simply

wrong. There is a potential for the breakdown of competitive conditions at the intermediary level in the chain of distribution of apple juice, and section 2(a) of the Clayton Act is as much concerned with the level as with the manufacturing or retail level. The majority's reference to Gregory not being a consumer is completely irrelevant for purposes of section 2(a) of the Clayton Act.

Unlike the majority, I start with the premise that Gregory is engaged in a line of commerce with which section 2(a) of the Clayton Act is concerned. Turning to the question whether section 4 should be interpreted as affording it the opportunity to seek relief, there are no reasons relevant to the antitrust laws suggesting that it should not be.

It is settled that a section 4 suit predicated upon a violation of section 2(a) of the Clayton Act requires proof of injury to business or property other than or apart from the amount of the price discrimination. *J. Truett Payne,* 451 U.S. at 561-63. A primary line competitor of the discriminator must prove injury to its business or property. A retail level competitor must prove injury to its business or property. An intermediary in the chain of distribution must prove injury to its business or property. None of these competitors can recover damages that the others might recover. The suggestion by the majority that there is a possibility of duplicate recovery, therefore, is simply false. This case is not at all like *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), which involved increased prices arguably passed through to consumers. No consumer purchasing from Wakefern Foods, Inc. could show an injury to business or property from being charged less than he would otherwise be charged. No retail competitor of Wakefern could recover the damages incurred by Gregory. No apple juice manufacturer could recover the damages incurred by Gregory or

by Wakefern's retail competitor. In sum, the majority's suggestion that these parties would have to be joined in Gregory's section 4 l awsuit is utterly fanciful.

The majority's reliance on the "indirectness" of Gregory's injury is equally misplaced. The complaint alleges two injuries that in a proximate cause sense are as direct as they can be: lost revenue which presumably translates into lost profits, and lost opportunity to continue as an intermediary in the apple juice market.

Gregory pleads that it has a business interest entirely separate from any other potential plaintiff. It alleges, and at the pleading stage we must assume it can prove, proximate cause between Wakefern's inducement of a section 2(a) violation and an injury to its business. Permitting Gregory to recover presents no problem of duplicate recovery because each potential plaintiff must satisfy the actual injury test announced in *J. Truett Payne,* 451 U.S. at 561-63. Gregory's proof of damages will be no more complex than would be the proof of damages required by any other potential primary line or retail level plaintiff. Of all the potential plaintiffs who may have been injured by the violation of section 2(a), Gregory has perhaps the strongest incentive for enforcement. All these factors suggest that Gregory should have section 4 standing.

The only factor arguably supporting the proposition that Gregory should not have standing is that section 4 damage remedies should never be used where the underlying substantive violation, while resulting in an actual injury to business or property, results only in a potential rather than actual injury to competition. It is well-settled, however, that violations of section 2(a) do support section 4 recovery in cases where the plaintiff is in the zone of

interest protected by that section and can show injury to business or property from the violation. *See Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories,* 460 U.S. 150 (1983); *J. Truett Payne,* 451 U.S. 557; *Utah Pie Co. v. Continental Baking,* 386 U.S. 685 (1967).

The majority in this case has ignored the plain language of section 2(a), which protects potential competition at all levels of distribution. Its analysis of section 4 standing is an unfortunate retrogression to the bad old days when this court used "standing" as a means of shutting the door on private antitrust enforcement for reasons which were essentially subjective and concealed. I had hoped that *Cromar Co. v. Nuclear Materials and Equipment Corp.,* 543 F.2d 501, 508 (3d Cir. 1976), had signalled the end of that era.

The order dismissing Gregory's complaint for lack of standing should be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-4554

GREGORY MARKETING CORP., et al,

Plaintiffs,

-vs-

WAKEFERN FOOD CORPORATION, et al

Defendants.

TRANSCRIPT OF PROCEEDINGS
MOTION OPINION

Newark, New Jersey
February 25, 1985

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

METH, NAGEL, RICE & BAUSCH, ESQS.
BY: BRUCE NAGEL, ESQ.
For the Plaintiffs

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WILENTZ, GOLDMAN & SPITZER, ESQS.
BY: ROGER KAPLAN, ESQ.
and
JAY N. FASTOW, ESQ. (N.Y.)
For Wakefern Food

MC DERMOTT, MC GEE & RUPRECHT, ESQS.
BY: LOUIS RUPRECHT, ESQ.
For Red Cheek, Inc.

THE COURT: In this matter the Defendant Wakefern Food Corporation and Defendant Red Cheek, Inc., have brought Motions to Dismiss Plaintiff Gregory Marketing Corporation and Plaintiff Daniel Scher's Complaint pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure.

Defendant Wakefern is a buying cooperative involved in the bulk purchasing and redistribution of store goods on behalf of numerous supermarket chains. Defendant Red Cheek is a manufacturer of apple juice and related products. Plaintiff Gregory is engaged in the business of brokering food products to commercial distributors and retailers on behalf of its client-manufacturers. Plaintiff Scher is an officer and majority shareholder of Gregory.

Plaintiff's Complaint alleged breach of a brokerage agreement, violation of State and Federal antitrust statutes, and tortious interference with plaintiff's contract rights and prospective business advantage. Defendants contend that plaintiffs have no standing to bring their antitrust claims, and since plaintiffs' only Federal claim should be dismissed, the remaining State law claims should also be dismissed for lack of subject matter jurisdiction.

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Under Rule 12(b)(6), the standard of review which I must apply is that the Complaint may be dismissed only if taking the factual allegations of the Complaint to be true, it appears that plaintiff can prove no set of facts which would entitle it to relief. See *Cruz v. Beto,* 405 U.S. 319 (1972).

Plaintiff alleges that in or about 1954, Gregory and Red Cheek entered into an agreement whereby Gregory would act as Red Cheek's broker in New Jersey. The compensation for Gregory's services was a percentage of the gross sales of Red Cheek products deriving from the efforts of Gregory.

In or about February 1984, it is alleged that Scher became aware of Red Cheek's practice of discounting certain products which were sold to Wakefern. It is alleged that Scher immediately informed Red Cheek of the wrongful nature of such price discrimination, but was directed by Red Cheek to supply other inquiring customers with fabricated explanations as to the justification of such discounting practices.

Shortly after Scher refused to comply with the directives of Red Cheek, Red Cheek terminated the brokerage agreement by and between the parties. Plaintiff alleges that Wakefern utilized its dominant position in the marketplace to induce Red Cheek to discriminate in prices between different purchasers of products.

The injuries allegedly suffered by plaintiffs as a result of the defendants' allegedly predatory pricing practices are twofold. Firstly, Red Cheek's retaliatory termination of the parties' brokerage agreement caused Gregory grievous financial harm resulting from loss of future revenues. Secondly, plaintiffs lost commission based upon the lower prices granted to Wakefern as plaintiffs' commission was calculated as a percentage of Red

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Cheek's gross sales derived from plaintiffs' brokering efforts.

In bringing a private antitrust suit, plaintiffs rely on Section 4 of the Clayton Act, 15 U.S.C. Section 15, which allows certain persons to sue for treble damages under the antitrust laws. In spite of the broad language of the statute, both the Third Circuit and the Supreme Court have limited the use of this exceptional remedy through the concept of "antitrust standing" for fear that the near limitless scope of the statute would undermine competition rather than enhance it by subjecting defendants to "overkill." See *Cromar v. Nuclear Materials & Equipment Corp.*, 543 F. 2d 501, 506 (3d Cir. 1976); *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519 (1982).

"Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." See *Associated General Contractors, supra* at page 534 citing Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n. 14 (1972).

Although it is "virtually impossible to announce a black-letter rule that will dictate the result in every case," *Associated General Contractors* at 536, the Supreme Court has enumerated factors that favor judicial recognition of antitrust claims.

First, the Complaint must allege a causal connection between the antitrust violation and the harm alleged and the Complaint must allege that defendants intended to cause that harm. See *Associated General Contractors* at 537.

Second, it is often appropriate to focus on the nature of plaintiffs' alleged injury. See page 538 of the *Associated* Opinion.

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Third, an additional factor is the directness or indirectness of the asserted injury. See page 540. See also *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 476 (1982).

Lastly, the case law stresses the importance of avoiding the risk of duplicate recoveries. See *Associated General Contractors, supra,* at Page 544, and *Blue Shield, supra,* at Page 474.

I now turn to each of these factors as applied to the case at bar.

Plaintiff alleges that defendants' price discrimination scheme, in combination with Defendant Wakefern's dominant purchasing power and plaintiffs' refusal to collaborate in the scheme proximately caused the retaliatory termination of the brokerage agreement and plaintiffs' lost commissions. Plaintiffs allege that such harm was intentional.

The Supreme Court has stated, however, that "the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry," and "an allegation of improper motive, although it may support a plaintiff's damages claim under Section 4, is not a panacea that will enable any Complaint to withstand a Motion to Dismiss." See *Associated General Contractors, supra,* at Page 537.

Thus, I turn to the nature of plaintiffs' alleged injury. The plaintiffs' injury "must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." See page 540 of *Associated General Contractors.*

As the Court stated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), for plaintiffs to recover under

the antitrust laws "they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." See Page 489 of that Opinion.

Subsequently, as I noted in the colloquy, in *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F. 2d 958, 964 n. 14 (ed Cir. 1983), *cert. denied*, 104 S.Ct. 1278 (1984), the Third Circuit stated that: "A claimed injury must be of the type that Congress sought to redress in providing a private damage remedy, and it must flow 'from that which makes defendants' acts unlawful.' " *Blue Shield*, 102 S.Ct. at 2550 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 489 . . . (1979); See *Associated Gen. Contractors*, 103 S.Ct. at 908-09."

The claimed violation of the antitrust laws here is based on the preferential price given to Wakefern by Red Cheek. The anticompetitive effect of such actions is on those competitors of Wakefern's that did not receive the price cuts. Plaintiffs' injuries of lower commissions and the breach of its contract are not injuries received by reason of that which made defendant's actions unlawful. As the Court noted in *Haff v. Jewelmont Corp.*, 1984-2 Trade Cas. (CCH) Paragraphs 66,222 at 66,915 (N.D. Cal. 1984), an analagous case, the injury to the broker would have been "precisely the same if (the manufacturer) had converted all of its accounts to (direct) accounts and had not granted preferential treatment to (the retailer)," thereby avoiding any Robinson-Patman claim. Conversely, the *Haff* Court noted that "if the manufacturer had given the retailer the same preferential discount but made the sale through plaintiff, plaintiff would not have been

injured at all, yet there would still be a violation of Section 2(c)."

Similarly, in the instant case, had Red Cheek reduced its priced for all buyers, Gregory would still have suffered the lost commissions, although there would have been no antitrust violation.

In addition, had Red Cheek given Wakefern preferential treatment but not reflected the discounts in Gregory's commissions, nor asked Gregory to provide fabrications on its behalf, there would have been no injuries to Gregory, although there would have been an antitrust violation by Red Cheek and Wakefern.

Plaintiffs make no claim that they are customers or competitors in the competition in the sale of food. Plaintiffs are brokers and obtain a commission regardless of which food buyer uses its food brokerage services. A reduction in competition in the sale of food does not necessarily reduce their commissions. Plaintiffs may be injured by defendants' actions, but the injury is not the type of injury that the antitrust laws were written to guard against.

The third factor often analyzed—the directness or indirectness of the injury—is, in this case, closely related to the fact that plaintiffs' injuries are not "antitrust injuries." Plaintiffs' injuries here are derivative of the reduced prices to Wakefern. None of Red Cheek's actions directly affected plaintiff. Plaintiffs' reduced commissions are an indirect result of lower prices, and are an inherent risk of the brokerage business.

Defendants' breach of contract with plaintiff is also not directly a result of the lower prices offered to Wakefern. Red Cheek's actions are based upon totally discrete conduct—an alleged

breach of contract, which is a separate and distinct choice by Red Cheek to terminate a contractual relationship. A decision I might say not to deal with a certain customer does not give rise to a cause of action under the Robinson-Patman Act.

As the Court stated in *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819 (N.D. Tenn 1974), the Robinson-Patman Act "is not all encompassing, and does not provide relief against every form of unfair or inequitable treatment of customers. It does not, for example, reach what arguably is the most extreme discrimination of all: namely, a total refusal to even deal with a particular individual or class of customers." See page 850 of that Opinion.

Plaintiffs' attempt to circumvent this rationale by analogizing their situation to that alleged in *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F. 2d 1378 (9th Cir. 1982) where a former employee of defendant brought an antitrust suit claiming he was forced to resign from his job because he refused to implement a company price-fixing and market allocation scheme. The Court granted the former employee standing to sue.

Ostrofe is inapplicable to the instant action for a number of reasons. The most obvious distinction betwen *Ostrofe* and this action is that plaintiffs are not employees of defendant. An employer-employee relationship is quite different than that between a broker and a seller. Much of the *Ostrofe* rationale rests on the fact that an employee is forced with the choice of either participating in an unlawful scheme or forfeiting his employment. No such choice exists here where a broker is free to either find other accounts or distance himself from the unlawful scheme. Secondly, even were the relationship similar, "neither the Supreme Court nor the Third Circuit has yet extended standing under the

antitrust laws as far as the Ninth Circuit has." See *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982).

Finally, the importance of avoiding the risk of duplicative recoveries demonstrates why antitrust standing is not found in this case. The competitors of Wakefern, who have been directly injured as a result of defendant's alleged anticompetitive practices could still sue defendants exposing them to the risk of multiple liability.

In conclusion, Plaintiff Gregory's antitrust claims must be dismissed for lack of subject matter jurisdiction. As Plaintiff Scher's claims are derivative of Plaintiff Gregory's, and thus even more indirect, his claims are dismissed under the same reasoning.

As plaintiff's Federal antitrust claim is their only basis for Federal jurisdiction, plaintiff's Complaint now fails to allege any basis for Federal jurisdiction. Under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) the pendent State law claims must accordingly also be dismissed, including plaintiff's State antitrust claim. And plaintiff is, therefore, relegated to the State Courts for relief on these claims.

Would you draw an appropriate Order, Mr. Kaplan?

MR. KAPLAN: Yes.

THE COURT: Thank you. Good afternoon.

MR. NAGEL: Thank you, Judge.

(Whereupon, the matter stands adjourned.)

APPENDIX C—RELEVANT STATUTE 15 U.S.C. § 15

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumental titles of foreign states

(1)Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

APPENDIX D—RELEVANT STATUTE 15 U.S.C. § 13(a)

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to

render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescense of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

No. 85-1981

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GREGORY MARKETING CORPORATION and DANIEL SCHER,

Petitioners,

—vs.—

WAKEFERN FOOD CORPORATION and RED CHEEK, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WAKEFERN FOOD CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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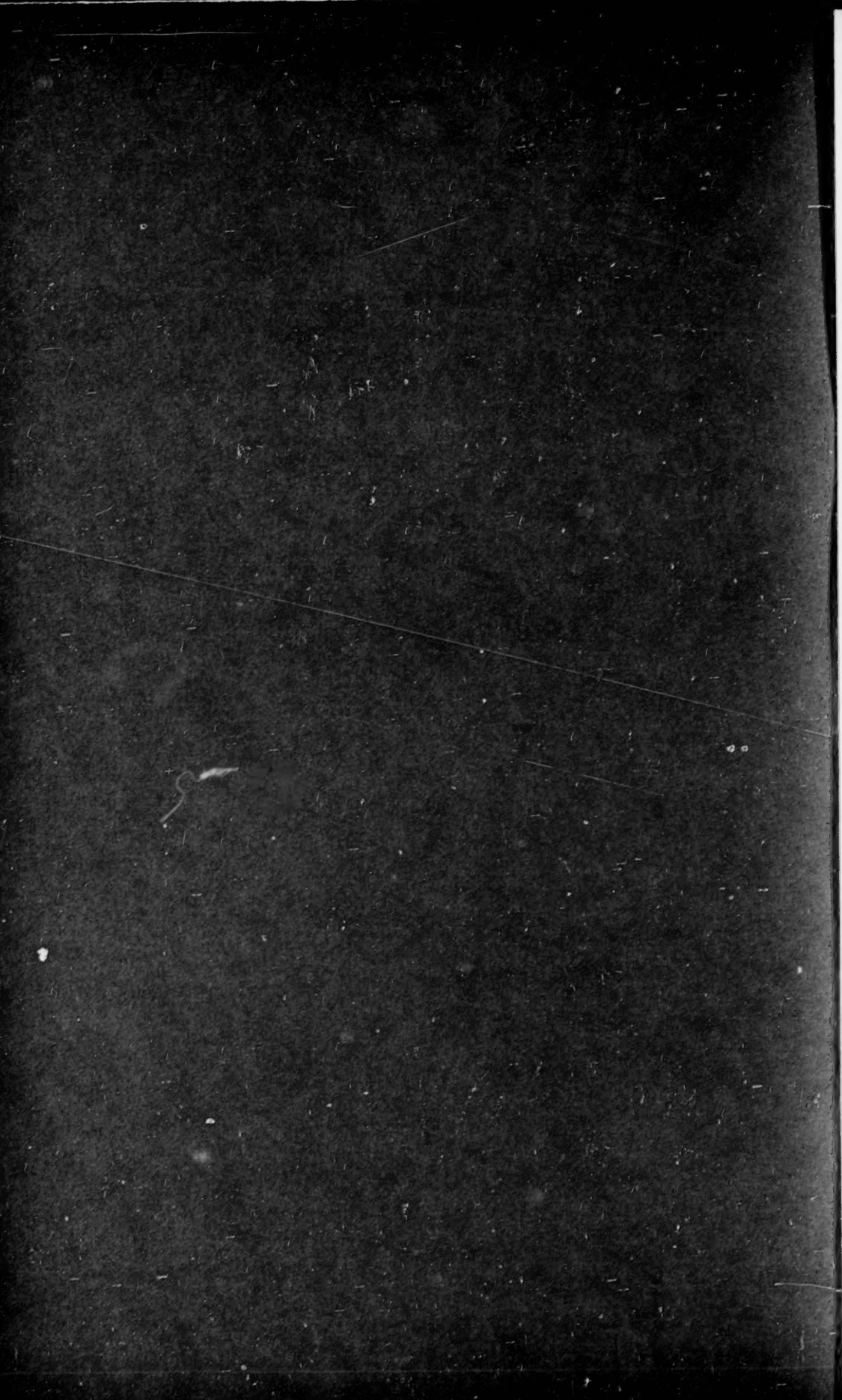

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the dismissal, for lack of standing, of a treble damages Robinson-Patman Act price discrimination claim by an independent food broker against an alleged seller and an alleged buyer of apple juice when, *inter alia*, (i) the broker admittedly was neither a consumer nor a competitor in any market of the economy relevant to this action, and (ii) the broker's alleged injury had nothing to do with any claimed reduction in competition, was completely independent of the asserted elements of the alleged Robinson-Patman Act violation and was based solely on a claimed deprivation of contract rights with the alleged seller?

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IN THE

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No. 85-1981

GREGORY MARKETING CORPORATION and DANIEL SCHER,

Petitioners,

—vs.—

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WAKEFERN FOOD CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Third Circuit Court of Appeals has been reported at 787 F.2d 92.

Rule 28.1 Statement

Wakefern has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

STATEMENT OF THE CASE

The Parties

According to the Complaint, petitioner Gregory Marketing Corporation ("Gregory") is a food broker. (App. at 1, ¶ 1).[1] By its own admission, it is "neither a consumer nor a competitor in any market of the economy relevant to this action . . . ." (P. App. A at 13a.)

Plaintiffs further allege: that Daniel Scher ("Scher") is the president and majority shareholder of Gregory (App. at 2, ¶ 2);[2] that respondent Red Cheek, Inc. ("Red Cheek") manufactures and distributes apple juice and related products (App. at 2, ¶ 4); and that respondent Wakefern Food Corporation ("Wakefern") purchases food and related products on behalf of shareholder members (App. at 2, ¶ 3).

The Complaint

The Complaint alleges that Gregory entered into an agreement with Red Cheek to act as its broker in the State of New Jersey. (App. at 2, ¶ 1). It further alleges: that during February through August 1984, Red Cheek charged Wakefern lower prices for certain apple juice products than it charged other customers (App. at 3, ¶ 3); that Scher became aware of Red Cheek's asserted discriminatory sales to Wakefern; that upon informing "Red Cheek of the wrongful nature of such price discrimination, [he] was directed by Red Cheek to supply other inquiring customers with fabricated explanations as to the justification of such discounting practices" (App. at 3, ¶ 3);

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1 References to the Petition for a Writ of Certiorari are denoted as "Pet. at ____." References to the Appendices to the Petition are denoted as "P. App. ____ at ____." Petitioners' complaint appears at pages 1 through 7 of the Appendix submitted to the Court of Appeals for the Third Circuit ("App.").

2 Petitioners conceded in the District Court that Scher's claim is entirely derivative of Gregory's, and that he lacks standing. (P. App. A at 4a, n.1).

and that "[s]hortly after Scher refused to comply with the directives of Red Cheek, Red Cheek terminated the brokerage agreement by and between the parties" (App. at 3, ¶ 5).

On the basis of these allegations, the Complaint sought treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for a claimed violation of the price discrimination provisions in the Robinson-Patman Act, 15 U.S.C. §§ 13(a) *et seq.*[3] The Complaint also asserted state law contract and tort claims.

Proceedings Below

The District Court dismissed petitioners' Robinson-Patman Act claims with prejudice pursuant to Fed. R. Civ. Pro. 12(b)(6). Relying on this Court's decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), it held that plaintiffs lack standing under Section 4 of the Clayton Act, noting in part that the Complaint failed to allege the necessary antitrust injury—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful." (P. App. B. at 28a).[4]

The Third Circuit affirmed, emphasizing, *inter alia*, that Gregory admittedly was not a participant in any market relevant to this case, that its alleged injury did not result from any asserted anticompetitive effect of the claimed price discrimina-

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3 The Complaint does not allege any causation between Gregory's purported refusal to provide explanations and Red Cheek's alleged termination of its supposed contract with Gregory. Nor does the Complaint allege that Wakefern had anything to do with the asserted termination of Gregory's claimed brokerage agreement with Red Cheek. Moreover, in listing the statutes involved here, the Petition refers to only one substantive provision: Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). (Pet. at 2). As the alleged purchaser, Wakefern could not violate that statute.

4 After dismissing the Robinson-Patman Act claims, the District Court dismissed petitioners' state law claims for lack of jurisdiction. (P. App. B at 31a). Petitioners do not contend that this dismissal of their state law claims was erroneous.

tion, and that other persons—competitors of the asserted purchaser—were better situated to make any appropriate allegations in this regard. (P. App. A. at 9a, 13a-14a). The court also held that Gregory's participation was not essential to the implementation of the alleged anticompetitive conduct, since Red Cheek could have granted the asserted discounts without even notifying Gregory. (P. App. A at 10a-11a).

SUMMARY OF ARGUMENT

1. The judgment of the Court of Appeals does not conflict with the decision of the Ninth Circuit in *Ostrofe* v. *H.S. Crocker Co.*[5] In contrast to the situation in *Ostrofe*, under the allegations of the Complaint: (i) petitioners' federal antitrust claims do not invoke the Sherman Act, but are brought only under the Robinson-Patman Act, with its more limited competitive objectives; (ii) Gregory was by no means an "essential participant" in the alleged antitrust violation; (iii) Gregory is an independent food broker, not an employee of any defendant; and (iv) other persons—the competitors of the alleged purchaser—were in a position (indeed, a better position) to complain of any alleged anticompetitive acts.

2. The decision in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), in no way rejected the significance in an antitrust standing analysis of plaintiff's participation and injury in the relevant market, or abolished the antitrust injury criteria. The subsequent decision in *Associated General Contractors*, *supra*, confirms the importance of these factors with regard to antitrust standing.

3. Far from falling within the issue purportedly "left open" in *Associated General Contractors*, petitioners' claims are governed by, and were properly dismissed under, that decision.

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5 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded in light of Associated General Contractors*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 105 S. Ct. 1155 (1985).

REASONS FOR DENYING THE PETITION

I. THE JUDGMENT OF THE COURT OF APPEALS DOES NOT PRESENT A CONFLICT IN THE CIRCUIT COURTS

Petitioners attempt to portray the judgment below as presenting a conflict with the decision of the Ninth Circuit in *Ostrofe* v. *H.S. Crocker Co.*, *supra*. In *Ostrofe*, the Ninth Circuit granted standing to a former employee of the defendant, who claimed that he was forced to resign from his job because he refused to implement a company price-fixing and market division scheme in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This case is entirely distinguishable from *Ostrofe*.

Whereas *Ostrofe* involved a claim under Section 1 of the Sherman Act, with its various conspiracy doctrines, the instant claim is brought under the price discrimination provisions in the Robinson-Patman Act. At most, only a purchaser or a competitor injured by an unlawful discriminatory sale can suffer harm of the type those provisions were designed to prevent.[6] Under its own allegations, Gregory is not so situated. And, Robinson-Patman Act claims brought by terminated employees have consistently been dismissed for lack of antitrust standing.[7]

Moreover, unlike the plaintiff in *Ostrofe*, Gregory was not, under its own allegations, an "essential participant" in the alleged anticompetitive conduct. As the Third Circuit held, under the allegations of the complaint, Red Cheek could have "provided Wakefern with special discounts, but simply absorbed the loss itself and neither told Gregory nor demanded

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6 *See Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980); *Klein* v. *Lionel Corporation*, 237 F.2d 13, 15 (3d Cir. 1956).

7 *See McNulty* v. *Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982); *Callahan* v. *Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982); *Booth* v. *Radio Shack Division*, 1982-83 Trade Cas. (CCH) ¶ 65,001 (E.D. Pa. 1982).

that the broker fabricate an explanation for other customers. . . ." (P. App. A at 11a).

Gregory is also unlike the plaintiff in *Ostrofe* in that Gregory is not an employee of any defendant, but is an independent food broker. As the District Court recognized:

> An employer-employee relationship is quite different from that between a broker and seller. Much of the *Ostrofe* rationale rests on the fact that an employee is forced [sic] with the choice of either participating in an unlawful scheme or forfeiting employment. No such choice exists here where a broker is either free to find other accounts or distance himself from the unlawful scheme.

(P. App. B at 30a).

Furthermore, in *Ostrofe* the terminated employee was the only person in a position to complain of the alleged anticompetitive acts, because that conduct assertedly had been concealed. In contrast, petitioners have asserted that other purchasers of apple juice—who are better situated to bring any appropriate claim of this nature—made inquiries as to the pricing of Red Cheek apple juice. (Pet. at 3; App. at 3, ¶ 3).

Far from issuing conflicting decisions, the circuit courts have been unanimous in dismissing for lack of standing antitrust actions brought by brokers based upon alleged violations in markets in which they did not participate. *Larry R. George Sales Co.* v. *Cool Attic Corp.*, 587 F.2d 266, 271-72 (5th Cir. 1979); *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); *Robinson* v. *Stanley Home Products*, 272 F.2d 601 (1st Cir. 1959).

Moreover, in *Exhibitors' Service, Inc.* v. *American Multi-Cinema, Inc.*, 788 F.2d 574 (9th Cir. 1986), the Ninth Circuit recently ordered the dismissal for lack of standing of a claim brought under Section 1 of the Sherman Act by a motion picture licensing agent that allegedly was terminated as a result of an unlawful agreement between two motion picture exhibitors. Distinguishing its previous decision in *Ostrofe* on the ground, *inter alia*, that plaintiff there—unlike the broker

here—was an "essential participant" in the alleged anti-competitive conduct, the Ninth Circuit held that:

> [E]xamining the nature of ESI's injury, we find it was not of "the type the antitrust laws were intended to forestall." [Citation omitted]. As with the union in *Associated General Contractors*, ESI is neither a consumer of defendants' goods or services nor a competitor of the defendants in the restrained market. See 459 U.S. at 538-39.

Id. at 578-79.

Thus, petitioners' effort to create a conflict among the circuits fails.

II. THE JUDGMENT OF THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE HOLDING IN BLUE SHIELD OF VIRGINIA v. McCREADY

Petitioners also argue that the decision in *Blue Shield of Virginia* v. *McCready, supra*, "rejected the requirement that the plaintiff be a consumer or competitor to have standing to sue under Section 4 of the Clayton Act," and denounced the view that plaintiff's injury must "reflect the 'anticompetitive effect' " of the violation. (Pet. at 5). Far from rejecting these principles, the Court in *Blue Shield* stressed that a plaintiff must demonstrate a sufficient "relationship [between] the injury alleged [and] those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful." 457 U.S. at 478.

Plaintiff in *Blue Shield* was a consumer in the market in which the alleged restraint occurred, and her injury was "inextricably intertwined" with the injury defendants there sought to inflict on that market.[8] In the language quoted by petitioners, she was a victim "of the forbidden practice,"[9] *i.e.*, had suffered antitrust injury. As described above, under its own allegations, Gregory does not stand in her shoes.

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8 *Blue Shield*, 457 U.S. at 480, 484.

9 Pet. at 5, *quoting Blue Shield*, 457 U.S. at 472.

In any event, the Court's later decision in *Associated General Contractors* emphasizes the importance in a Section 4 standing inquiry of the plaintiff's participation and injury in the relevant market, and expressly includes antitrust injury in its criteria for antitrust standing. 459 U.S. at 538-40. Petitioners' second argument thus fails.

III. THE ISSUE "LEFT OPEN" IN ASSOCIATED GENERAL CONTRACTORS IS INAPPLICABLE HERE

Petitioners' last argument is that the Court should address here the issue "left open" in footnote 44 of its decision in *Associated General Contractors*, 459 U.S. at 541 n.44. Petitioners mischaracterize that issue, which in any event gives them no assistance. That footnote states as follows:

> [T]he Union was not a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' course of practices. We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.

Id. Since Gregory is, under its own assertions, neither a participant in any market relevant to this case, nor a direct victim of defendants' alleged anticompetitive practices, there is likewise no need to decide that issue here. Nor would that issue be applicable in any event, since plaintiffs do not allege a boycott claim. As the courts below held, the decision in *Associated General Contractors* disposes of petitioners' claims.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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